Section 273.65 of the National Defence Act: Inappropriate and Unconstitutional

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Introduction

After six short weeks of debate, Bill C-36, *The Anti-terrorism Act*,[1] passed into law on 28 November 2001. Bill C-36 was Parliament's formal legislative response to the terrorist attacks upon the U.S. on September 11. Among other things, Bill C-36 amended the *National Defence Act*[2] to grant the Minister of National Defence, in place of a judge, the power to authorize the Communications Security Establishment (CSE) to intercept private communications for the purpose of obtaining foreign intelligence under section 273.65. The CSE's mandate includes acquiring and providing foreign signals intelligence.[3] In this article, I argue that this amendment to the *National Defence Act* abolished an essential safeguard to arbitrary state actions and likely violates section 8 of the *Canadian Charter of Rights and Freedoms*.[4] The eventual removal of section 273.65 from the *National Defence Act* would uphold the long-standing, appropriate, and constitutional doctrine that the power to authorize agents of the state to intercept private communications rests solely with the judiciary.

Section 273.65 Abolishes an Essential Safeguard to Arbitrary State Actions

By shifting the power to authorize agents of the state to intercept private communications from the judiciary to the executive, section 273.65 abolished an essential safeguard to arbitrary state actions. In the post-*Charter* era, both Parliament[5] and the courts[6] conferred the power in question on the judiciary. Judges, presumed to be impartial and independent observers, ensured that state actions were not arrived at arbitrarily. Nevertheless, section 273.65 nullified such a safeguard by granting the Minister of National Defence, a member of the executive, the power to authorize the CSE to intercept private communications. As a politician and member of Cabinet, the Minister of National Defence cannot be presumed neutral: cast in the role of adversary, in matters of national security he or she is a properly interested party in favor of security over individual freedoms. Moreover, since the CSE is an agency of the Department of National Defence,[7] the Minister cannot be considered independent with regard to CSE investigations. Absent real limits to the executive's discretion to issue such authorizations, section 273.65 defies the wisdom and strength of entrusting this power to the judiciary, thereby rendering state actions less accountable.

Section 273.65 Violates Section 8 of the *Charter*

For section 273.65 to be quashed via *Charter* review, a court must conclude that this provision violates a *Charter* right or freedom and cannot be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*.[8] The test for section 1 was laid

out in *R. v. Oakes*[9] and is comprised of four criteria: (1) the objective of the impugned law must be pressing and substantial in a free and democratic society, (2) the impugned law must be rationally connected to its objective, (3) the impugned law must impair the *Charter* right or freedom in question as little as reasonably possible, and (4) the benefits the impugned law achieves must outweigh the costs that results from its infringement of the *Charter* right or freedom.[10] It is necessary that the challenged law satisfy each of the four requirements of the *Oakes* test in order to be "saved" under section 1 of the *Charter*.[11] Otherwise, that law is rendered "of no force or effect" under section 52(1) of the *Constitution Act, 1982*.[12]

Section 273.65 likely violates section 8 of the *Charter* because it allows the Minister of National Defence, in place of a judge, to authorize the CSE to intercept private communications. Section 8 provides that "Everyone has the right to be secure against unreasonable search or seizure."[13] To be reasonable under section 8, a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.[14] The Supreme Court has ruled that a valid search under section 8 generally requires prior judicial authorization.[15] Moreover, interceptions of private communications (both oral and telecommunications) were found to fall within the scope of section 8.[16] The more intrusive the search, the greater the degree of justification needed to hold it within the scope of section 8 of the *Charter*.[17] Thus, subject to exigent circumstances (*inter alia*),[18] agents of the state must generally obtain prior judicial authorization in order to intercept private communications. If no such authorization is obtained, seized communications may be rendered inadmissible at trial under section 24(2) of the *Charter*.[19] Despite these long-standing precedents, however, the Minister of National Defence now has the authority to issue an authorization to the CSE to intercept private communications, once he or she is satisfied that: (a) the interception will be directed at foreign entities located outside Canada, (b) the information to be obtained could not reasonable be obtained by other means, (c) the expected foreign intelligence value of the information that would be derived from the interception justifies it, and (d) *satisfactory* measures are in place to protect the privacy of Canadians and to ensure that private communications will only be used or retained if they are essential to international affairs, defence or security.[20]

For some, given that the CSE only targets "foreign intelligence,"[21] section 273.65 does not fall within the scope of section 8 of the *Charter*. Prior to Bill C-36 coming into force, the CSE was prohibited under Part VI the *Criminal Code* from unilaterally intercepting those private communications which intelligence targets abroad sent to or received from Canada.[22] After Bill C-36 came into force, however, the CSE was exempted from Part VI of the *Criminal Code* and allowed to intercept private communications "when directing its activities against foreign entities located abroad."[23] When asked whether the CSE requires prior judicial authorization in cases where the target is foreign but the private communication has been sent to or received from Canada, the Department of Justice responded: "In our view, quite clearly it does not."[24] The Minister of National Defence's authorization is now a substitute for judicial authorization at the international level.[25] The Minister of National Defence Art Eggleton stated that, under section 273.65, the "CSE will be able to identify the communication of a foreign target abroad and to follow those communications *wherever they go*."[26] These statements suggest that, while section 8 applies at the domestic level, it has no place at the international scene – even when a person is targeted on Canadian soil.

Such a suggestion, however, cannot be reconciled with the depiction of section 8 as the "supreme law of Canada."[27] Moreover, a number of Supreme Court extradition cases support the view that *Charter* rights and freedoms apply to Canadians at the international level. In the 1991 companion cases *Reference re Ng Extradition (Canada)*[28] and *Kindler v. Canada (Minister of Justice)*,[29] the Supreme Court held: "The Charter clearly applies to extradition matters, including the executive decision of the Minister that effects the fugitive's surrender . . . ."[30] In *United States v. Burns*,[31] the Supreme Court unanimously

decided that section 7 of the *Charter* requires the Minister of Justice to obtain, in all but exceptional circumstances, assurances that the death penalty will not be applied before extraditing a fugitive. In *United States of America v. Cotroni*,[32] the Supreme Court held that, although extradition of a Canadian citizen *prima facie* infringes section 6(1) of the *Charter*, it is a reasonable limit that can be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*. Finally, in *United States of America v. Kwok*,[33] the Supreme Court held that the extradition of an accused may constitute an unjustified infringement of section 6(1) if an equally effective prospect of prosecuting in Canada had been unjustifiably and improperly abandoned. By means of analogy, since section 8 likely applies to Canadians at the international level, section 273.65 infringes upon it.

Section 273.65 Cannot Be "Saved" under Section 1 of the *Charter*

Considering section 1 of the *Charter,* section 273.65 would probably fail the minimal impairment branch of the *Oakes* test. Then-Minister of National Defence Art Eggleton held that the objective of section 273.65, which is both pressing and substantial, was to enhance the CSE's ability to gather foreign intelligence and protect government electronic information and information infrastructures.[34] However, less intrusive means to achieving these objectives exist devoid of s. 273.65: the *Criminal Code* also allows the CSE to intercept private communications swiftly (*i.e.*, without having to obtain prior judicial authorization) in order to prevent harm[35] or in exceptional circumstances,[36] and it permits applications for judicial authorizations to be made by means of telecommunications where necessary.[37] No real evidence was offered to demonstrate the inadequacy of such provisions in dealing with matters of national security,[38] or that the CSE had difficulties performing its mandate since its inception in 1946. Finally, a long-standing U.S. Supreme Court case supports the view that judges are capable of appreciating the intricacies of national security investigations and preserving the secrecy that is required.[39] Therefore, absent a highly intrusive section 273.65, the CSE would still be able to achieve its objectives with the requisite speed and stealth.

Alternatively, section 273.65 would likely fail the overall proportionality branch of the *Oakes* test.[40] By providing assistance to federal law enforcement and security agencies, the potential benefits of section 273.65 include the prevention of terrorism, the apprehension and/or conviction of terrorists, and the disruption of terrorist organizations. In order to balance the state's right to intrude on privacy to further its goals with the right of individuals to be left alone, the Supreme Court held that agents of the state must "always seek prior judicial authorization before using electronic surveillance."[41] Nevertheless, section 273.65 undermines such a balance by permitting the state to trudge heavily upon individuals' privacy interests without sufficient justification. Since that law was enacted, there have been no recorded cases of its use or of any benefits derived thereof. Section 273.65 allows the CSE to intercept private communications "on the basis of mere suspicion";[42] such a possibility surely contributes to a substantial loss of public confidence towards state actions and the administration of justice. Furthermore, the absence of opportunity to test the validity of an authorization, before and after the fact,[43] ensures that individuals' section 8 rights will be neither addressed nor protected.[44] Overall, the potential benefits of section 273.65 are exceeded by the costs incurred from its section 8 violation.

For some, section 273.65's infringement of section 8 of the *Charter* would constitute a reasonable limit and thus be "saved" under section 1 of the *Charter.*[45] This view was originally expressed by Chief Justice Dickson in *Hunter v. Southam:*[46] "Where the State's interest is not simply law enforcement as, for instance, where State security is involved, . . . the relevent standard might well be a different one than the Oakes test." Such a statement by the Supreme Court seemed to indicate that "the protection of national security [is] a particularly compelling objective that would affect the manner in which [the Supreme Court] would determine both the content of *Charter* rights and reasonable limits

on those rights."[47] Given that the CSE's mandate deals with matters of national security,[48] section 273.65 could thus amount to a reasonable limit on section 8. Nevertheless, this argument is not entirely convincing: the Supreme Court's willingness in *Hunter v. Southam* to apply different tests to matters of national security emerged from Justice Dickson's *obiter dictum* – which is not binding on future Courts.

Furthermore, in a long-standing Vietnam War-era U.S. Supreme Court case,[49] wiretaps authorized by the President via the Attorney General in matters of domestic security were found to violate the prohibition in the Fourth Amendment to the U.S. Constitution on "unreasonable searches and seizures"[50] (the U.S. equivalent of section 8 of the *Charter*). In *U.S. v. U.S. District Court*,[51] three accused were charged, based in part on the government's surveillance of their conversations, with conspiracy to destroy government property. The Attorney General argued that the special circumstances applicable to domestic security surveillances necessitated an exception to the warrant requirement. The U.S. Supreme Court aptly held that the constitutional basis of the President's domestic security role must be exercised in a manner compatible with the Fourth Amendment, which requires a prior warrant review by "'a neutral and detached magistrate.'"[52] Overall, the claim that section 273.65 constitutes a reasonable limit lacks an authoritative voice in light of an established and persuasive U.S. Supreme Court case.

Granted, Canadian courts should be wary of adopting U.S. interpretations that do not accord with the interpretive framework of our constitution.[53] However, as the Supreme Court of Canada noted in various cases, including *Hunter v. Southam*,[54] American courts have the benefit of two hundred years of experience in constitutional interpretation and this wealth of experience may offer guidance to the judiciary in this country. Worth mentioning here is that the Supreme Court of Canada has adopted American Fourth Amendment jurisprudence in interpreting section 8 on a number of occasions.[55]

Conclusion

Although then-Justice Minister Anne McLellan claimed that existing criminal laws "are clearly not adequate" in combating terrorism,[56] she did not offer any real evidence that this was in fact true.[57] On the contrary, since its inception in 1946, there is nothing to suggest that the CSE had difficulties performing its mandate in light of the provisions of Part VI of the *Criminal Code*. Moreover, the Solicitor General of Canada, who collects and annually publishes the number of judicial authorizations granted for intercepting private communications, claimed that judges follow strict procedures and require police to provide them with a lot of information before granting authorizations.[58] So what proof is there that these provisions were inadequate to fight a still-unclear threat?

Overall, the Department of Justice overstepped the boundaries of what is appropriate and constitutional by creating legislation that allowed the Minister of National Defence to authorize the CSE to intercept private communications. When he was the Liberal Minister of Justice and Attorney General of Canada in the early 1980s, former Prime Minister Jean Chrétien told the Joint Committee on the Constitution: "I think we are rendering a great service to Canada by taking some of these problems away from the political debate and allowing the matter to be debated, argued, coolly before the courts with precedents and so on."[59] Why, then, did he allow fifteen lawyers in the Department of Justice to secretly create legislation that abandoned precedents and common sense? [60] It is now up to Parliament or the courts to remove section 273.65 from the *National Defence Act*. Parliament's objective in combating terrorism was to protect Canada's political, social, and economic security.[61] In effect, Parliament has increased state security at too great a cost to our civil liberties. Benjamin Franklin put it best when he said: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[62]

Notes

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1 S.C. 2001, c. 41, online: CanLII <http://www.canlii.ca/ca/sta/a-11.7/whole.html>.

2 *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.65, online: CanLII <http://www.canlii.org/ca/sta/n-5/sec273.65.html>[*National Defence Act*].

3 See "Welcome to the Communications Security Establishment," online: CSE Homepage <http://www.cse.dnd.ca/index-e.html>.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

5 See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 184.2, 184.3, 184.5, 186, online: CanLII <http://www.canlii.org/ca/sta/c-46/>.

6 See *R. v. Thompson*, [1990] 2 S.C.R. 1111, 1990 CanLII 102; *R. v. Duarte*, [1990] 1 S.C.R. 30, 1990 CanLII 2; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 111; and *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, 1996 CanLII 81.

7 "Welcome to the Communications Security Establishment," *supra* note 3.

8 *Charter*, *supra* note 4.

9 [1986] 1 S.C.R. 103, 1986 CanLII 46 [*Oakes*].

10 Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Canada Limited, 2002), at 779. Also see *ibid.* at paras. 69-71.

11 *Oakes*, *supra* note 9.

12 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

13 *Charter*, *supra* note 4.

14 See *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 11.

15 See *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145, 1984 CanLII 33.

16 See *R. v. Thompson, R.* v. *Duarte, R.* v. *Garofoli*, and *Michaud v. Quebec*, all *supra* note 6.

17 See *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83 [*Golden*]. A common law exception to this general rule requiring judicial authorization for searches allows the party seeking to uphold the validity of a warrantless personal search to demonstrate that there were reasonable and probable grounds for the type of search conducted by the police.

18 See *R. v. Grant*, [1993] 3 S.C.R. 223, 1993 CanLII 94 at 241-42: exigent circumstances exist if there is "an imminent danger of the loss, removal, destruction or disappearance of the evidence . . . if the search or seizure is delayed." In *Grant*, the Supreme Court held that s. 10 of the *Narcotic Control Act*, which provided that a peace officer may search a place that is not a dwelling house without a warrant so long as he believes on reasonable grounds that a narcotic offence had been committed, was consistent with s. 8 of the *Charter* if s. 10 were read down to permit warrantless searches only where mere were exigent circumstances. In *R.* v. *Golden*, *ibid.*, the Supreme Court concluded that strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported there. Consent searches were discussed in *R. v. Stillman*, [1997] 1 S.C.R. 607, 1997 CanLII 32. Moreover, the *Criminal Code* allows agents of the state to intercept private communications without prior judicial authorization in order to prevent harm (s. 184.1) or in exceptional circumstances (s. 184.4). In the U.S., the Supreme Court held in *United States v. United States District Court*, 407 U.S. 297 (1972) (FindLaw) [*U.S. District Court*]:

> It is true that there have been some exceptions to the warrant requirement. *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *McDonald v. United States*, 335 U.S. 451 (1948); and *Carroll v. United States*, 267 U.S. 132 (1925). But those exceptions are few in number and carefully delineated . . . ; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' *Terry v. Ohio* . . . at 20; *Chimel v. California* . . . at 762.

19 *Charter*, *supra* note 4.

20 *National Defence Act*, *supra* note 2. Law professor Lisa Austin pointed out that the term "satisfactory" in s. 273.65(2)(d) is ambiguous. See "Is Privacy a Casualty of the War on Terrorism?" [Austin] in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, Ronald J. Daniels, Patrick Macklem & Kent Roach, eds. (Toronto: University of Toronto Press, 2001) [*The Security of Freedom*] 251 at 264.

21 *National Defence Act, ibid.*

22 *Criminal Code*, *supra* note 5 at ss. 183, 184.1. Also see meeting of the Special Senate Committee, *Speaking Notes of Chief CSE, Parliamentary Review of the Anti-Terrorism Act* (Ottawa: 11 April 2005), online: <http://www.cse-cst.gc.ca/

documents/about-cse/ccse-anti-terrorist-act-11april2005-e.pdf>.

23 *Speaking Notes of Chief CSE*, *ibid.* at 7.

24 Testimony of Richard G. Mosley, Assistant Deputy Minister, Criminal Law Policy and Community Justice, Department of Justice, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, Doc. 38373 (Ottawa: 29 October 2001) at 26-27, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/c-36/october29.pdf>.

25 *Ibid.* at 26.

26 Testimony of Arthur Eggleton, Minister of Defence, *Proceedings of the Special Senate Committee on the Subject Matter of Bill C-36: Issue 3 – Evidence* (Ottawa: 24 October 2001), online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/sm36-e/03evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90> [emphasis added] [*Proceedings of the Special Senate Committee*].

27 *Constitution Act, 1867*, *supra* note 12 at s. 52(1).

28 [1991] 2 S.C.R. 858, 1991 CanLII 79.

29 [1991] 2 S.C.R. 779, 1991 CanLII 78 [*Kindred*].

30 *Kindred*, *ibid.* at para. 25.

31 [2001] 1 S.C.R. 283, 2001 SCC 7 (CanLII).

32 [1989] 1 S.C.R. 1469, 1989 CanLII 57.

33 [2001] 1 S.C.R. 532, 2001 SCC 18 (CanLII).

34 Testimony of Arthur Eggleton, Minister of Defence, *Proceedings of the Special Senate Committee*, *supra* note 26.

35 *Supra* note 5 at s. 184.1.

36 *Ibid.* s. 184.4.

37 *Ibid.* s. 184.3.

38 Martha Shaffer, "Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?" [Shaffer] in *The Security of Freedom*, *supra* note 20, 195 at 202.

39 *U.S. District Court*, *supra* note 18.

40 Though s. 273.65 will likely fail the minimal impairment branch of the *Oakes* test, this article will nonetheless continue to evaluate s. 273.65 in light of the overall proportionality branch of the *Oakes* test in order to strengthen the argument that s. 273.65 cannot be "saved" under s. 1 of the *Charter.*

41 Justice La Forest was referring to Part IV of the *Criminal Code* (now Part VI) in *R.* v. *Duarte*, *supra* note 6 at 45.

42 *Ibid*.

43 Apart from the annual report on s. 273.65 authorizations, no one – not even the commissioner of the CSE – appears to have the power to review the authorization. See Austin, *supra* note 20 at 264, note 13.

44 Testimony of Greg DelBigio, Member of the Canadian Bar Association, *Proceedings of the Special Senate Committee*, *supra* note 26.

45 *Charter*, *supra* note 4.

46 *Supra* note 15, at para. 43.

47 Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in *The Security of Freedom*, *supra* note 20, 131 at 133.

48 *Supra* note 1.

49 *U.S. District Court*, *supra* note 18.

50 The Fourth Amendment of the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

51 *U.S. District Court*, *supra* note 18.

52 *Ibid*. at 316, citing *Johnson v. United States*, 333 U.S. 10 at 13-14 (1947).

53 See *Hunter v. Southam*, *supra* note 15 at para. 30. *R. v. Rahey*, [1987] 1 S.C.R. 588, 1987 CanLII 52.

54 See *R. v. Simmons*, [1988] 2 S.C.R. 495, 1988 CanLII 12; *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CanLII 24; *R. v. Elshaw*, [1991] 3 S.C.R. 24, 1991 CanLII 28; and *Golden*, *supra* note 17.

55 In *Hunter v. Southam*, *supra* note 15, the Supreme Court of Canada adopted several of Justice Stewart's statements in the U.S. Supreme Court case *Katz v. United States*, 389 U.S. 347 (1967) (FindLaw) [Katz], in interpreting s. 8 of the *Charter*. For instance, the Supreme Court of Canada quoted with approval Justice Stewart's observation that "the Fourth Amendment protects people, not places" (at para. 24, citing Katz at 351) and that a "warrantless search was *prima facie* 'unreasonable' under the Fourth Amendment" (at para. 23). In *R. v. Wong*, [1990] 3 S.C.R. 36, 1990 CanLII 56, the Supreme Court of Canada noted that its conclusion that "a person who occupies a hotel room has a reasonable expectation of privacy and that the police cannot effect a warrantless search of the room" was consistent with American experience (at para. 30). In *R. v. Edwards*, [1996] 1 S.C.R. 128, 1996 CanLII 255, the Supreme Court of Canada considered and followed the U.S. approach of granting standing only to the accused person whose privacy right under s. 8 was allegedly infringed (at paras. 34-35, 45). In *R. v. Evans*, [1996] 1 S.C.R. 8, 1996 CanLII 248, the Supreme Court of Canada noted that its conclusion that

law enforcement officers' plain view observations did not constitute a search within the meaning of s. 8 "was consistent with the position adopted in the United States" (at para. 51).

56 Testimony of Anne McLellan, Minister of Justice, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, *supra* note 25 at 3.

57 Shaffer, *supra* note 38.

58 The Solicitor General of Canada suggested this in 1991. See Colin Goff, *Criminal Justice in Canada*, 2d. ed. (Toronto: Nelson Thomson Learning, 2001), at 232.

59 See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994) at 56.

60 Professor Don Stuart, *The Special Senate Committee on the Subject Matter of Bill C-36: Evidence*, Doc. 38477 (Ottawa: 5 December 2001) at 8, online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/c-36/December5-part2.pdf>.

61 The preamble of Bill C-36 states: "WHEREAS acts of terrorism threaten Canada's political institutions, the stability of the economy and the general welfare of the nation," *supra* note 1.

62 Benjamin Franklin, *Historical Review of Pennsylvania, 1759*, online: The Quotations Page <http://www.quotationspage.com/quote/1381.html>.